Supreme Court, U. S.
FILED
SEP 19 1975
MICHAEL RODAK, JR., CLERK

No. 75-438

In the Supreme Court of the United States

OCTOBER TERM, 1975

POTTAWATOMIE TRIBE OF INDIANS,
THE PRAIRIE BAND OF THE
POTTAWATOMIE TRIBE OF INDIANS, et al., *Petitioner*,

vs.

THE UNITED STATES OF AMERICA, *Respondent*.

Petition for Writ of Certiorari to the United States Court of Claims

ROBERT S. JOHNSON
1108 First National Bank Tower
Topeka, Kansas 66603

Attorney of Record, for the
Pottawatomie Tribe of Indians,
The Prairie Band of the
Pottawatomie Tribe of Indians,
et al. petitioner

H. M. IVES & SONS, TOPEKA

INDEX

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Treaties and Statutes Involved 3

Statement of the Case 3

(1) Background 3

(2) Reason for Non-Joinder by This Petitioner with Other Petitioners 4

(3) Best Evidence of Compensable Interest in Lands Is Treaty of 1795 and Negotiations Prior Thereto ... 5

(4) Award Given to Remedy Insufficiency of Treaty Consideration Should Be Divided Similar to Treaty Provisions 6

(5) Determination of Title to Other Pieces of Land, or Enclaves 6

Reasons for Granting the Writ 8

(1) The Decisions Below Conflict with the Constitutional Guarantee of the Rights of Petitioner Under the Due Process Clause and Adopts Faulty Theory of Title 8

(2) Substantial Evidence Concerning the Statements of the Parties to the Treaty Themselves Were Disregarded in Favor of Inappropriate Theories of Title Developed by the Courts Years Later 10

Conclusion 16

AUTHORITIES

Cases:

James Strong, et al. v. United States,
31 Ind. Cl. Comm. 89, decided August 9, 1973 4

James Strong, et al. v. United States,
____ Ct. Cl. ____ (1975) 2

Page

Red Lake, Pembina and White Earth Bands, et al. v. United States, 164 Ct. Cl. 389 (1964) 6

Sac & Fox Tribe v. United States, 179 Ct. Cl. 8, 383 F. 2d 991, cert. denied, 389 U.S. 900 (1967) 8

Turtle Mt. Band of Chippewa Indians v. United States, 203 Ct. Cl. 426, 490 F. 2d 935 (1974) 8

United States v. Pueblo of San Ildefonso, ____ Ct. Cl. ____ (April, 1975) 8

Statutes and Treaties:

American State Papers, Ind. Affairs, Vol. I, pp. 340-342 11

American State Papers, Ind. Affairs, Vol. I, pp. 548, 571, 574 5

American State Papers, Ind. Affairs, Vol. I, pp. 562-582, 7 Stat. 49 ..... 5, 10

Indian Cl. Comm. Act, 60 Stat. 1049 USC §705 (c) and 28 USC §1255 2

Treaty of Greeneville, August 3, 1795, 7 Stat. 44 ..... 1, 2, 3, 5, 7, 10

Treaty of Ft. Harmar, January 9, 1789, 7 Stat. 28 ..... 11, 12

Miscellaneous:

Constitution of the United States, Due Process Clause of the Fifth Amendment 8

Letter—Anthony Wayne to Secretary of War Pickering, May 15, 1795, P. 418 Def. Ex. 434 13

Vance, John, Commissioner, Indian Claims Commission, Quotation from PBS Television Broadcast (Summer, 1975) 14, 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No.

POTTAWATOMIE TRIBE OF INDIANS,
THE PRAIRIE BAND OF THE
POTTAWATOMIE TRIBE OF INDIANS, et al., *Petitioner,*

VS.

THE UNITED STATES OF AMERICA, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Claims

---

Petitioner The Pottawatomie Tribe of Indians, The Prairie Band of the Pottawatomie Tribe of Indians, et al. (recognized in the courts below as descendants of the tribe of Indians referred to in the treaty of Greeneville of August 3, 1795, 7 Stat., 49 variously as the "Putowatimes," "Potawatimes," and "Pattawatimas" and, therefore, proper parties in this treaty claim) plaintiffs in Docket 15-E in the Indian Claims Commission, pray that a writ of certiorari issue to the United States Court of Claims to review the judgment that Court rendered on June 25, 1975.

Opinions Below

The opinion of the Court of Claims, as yet unreported, rendered on June 25, 1975, on Appeal No.

1-74 from the Indian Claims Commission, is reprinted and attached as Appendix A to the petition of seven other petitioners filing a joint petition herein. The decision of the Indian Claims Commission, *James Strong, et al. v. United States*, 31 Ind. Cl. Comm. 89, dated August 7, 1973, is printed as Appendix B, and the Greeneville Treaty, included as Appendix C to the said joint petitioner's petition is filed under separate cover. This petitioner respectfully requests, in the interests of economy and minimizing the volume of the record on file in this proceeding, that such appendixes be considered as such for this petition and that Rule 23, requiring the said opinions be reprinted again with this petition, be waived.

Jurisdiction

The judgment of the Court of Claims was entered on June 25, 1975. This petition for certiorari was filed less than 90 days from the date aforesaid. Jurisdiction is invoked under §20 of the Indian Claims Commission Act, 60 Stat. 1049, 27 U.S.C. §705(c), and 28 U.S.C. §1255.

Questions Presented

1. Whether the twelve Indian Tribes which were parties to the treaty of Greeneville and which occupied and used the area referred to in this proceeding as Royce Area 11 should be denied a compensable interest in those lands under the Indian Claims Commission Act because they owned them in common, or shared such use and occupancy.

2. Whether, failing proof of exclusive use and occupancy of all or parts of Royce Area 11 by any one or more tribes, any supplemental treaty consideration found to be due as a result of the claims filed by the petitioners should be divided in that proportion of the value of the total area ceded which each claimant band's share bore to the total annuities provided for under Article 4 of the Greeneville Treaty of August 3, 1795.

3. Whether a failure to find aboriginal title in certain areas of land (Royce Areas 21, 22 and 23) should bar this petitioner from a compensable interest in these lands where there was shared use; and which lands, according to Indian spokesmen, were owned jointly by the Chippewa, Ottawa and Potawatomi.

4. Whether this petitioner should be denied a compensable interest in the lands described in the treaty as "the post of Detroit, and all the lands to the north, the west and the south of it, . . . " etc., when the evidence clearly shows that it shared the occupation and use of this area with the Wyandot, Chippewa and Ottawa and that no single tribe occupied the area exclusively.

Treaties and Statutes Involved

The treaty of Greeneville of August 3, 1795, 7 Stat. 49, is set forth as Appendix C, referred to above.

Statement of the Case

(1) Background

Certain statements were adopted by the Indian

Claims Commission as "Findings of Fact." (Findings of Fact, Opinion and Orders of the Indian Claims Commission rendered August 9, 1973, *James Strong, et al. v. United States*, 31 Ind. Cl. Comm. 89-222.) There is no argument about much of the historical background, and we will not here reiterate the same; but with some of the conclusions reached by the Commission and with which the United States Court of Claims concurred, we must take issue.

(2) Reason for Non-Joinder by This Petitioner with Other Petitioners

The reason this petitioner is not joining with the seven joint petitioners in asking for Writ of Certiorari is that the theory upon which this petitioner has sought relief both here and in the courts below is both different from and incompatible with that espoused by joint petitioners.

Unlike the joint petitioners, this petitioner did not rely upon the theories of "aboriginal title," "recognized title," or "exclusive occupancy," all of which were rejected by the Courts below as not being applicable to all of Royce Area 11; and only as to a small portion of Area 11 did the Court below find aboriginal title in the Delaware and Shawnee petitioners.

Having been denied aboriginal title to the rest of Royce Area 11, those petitioners, willing to accept what the lower Courts give them under the aboriginal title theory, now come somewhat closer to embracing the theory of this petitioner by joining the other five tribes in adopting a joint use theory.

We submit that none of these have anything like the relevancy to this treaty and to the facts leading up to it as does the theory which this petitioner has consistently pursued which may be summarized as follows:

(3) Best Evidence of Compensable Interest in Lands Is Treaty of 1795 and Negotiations Prior Thereto

The best evidence of the relative compensable interest in Royce Area 11 of the twelve Indian tribes who signed the Treaty of Greeneville is to be found in Article 4 of the treaty itself. The determination of liability should be based upon such provisions, especially since they were arrived at following a succession of treaties that were entered into with only a portion of the tribes having proper interests in the lands and that failed proper ratification; and also for the reason that no boundaries between the tribes could be established or agreed upon at the time of the treaty of 1795, and the repeated contentions of the Indians themselves that the tribes owned the lands in common. To attempt today to do what General Wayne refused, though directed by the Secretary of War, to do, namely to delineate arbitrary boundaries, is not appropriate considering the evidence presented to the Indian Claims Commission, which is not persuasive or definitive in this regard. [American State Papers, Ind. Affairs, Vol. I, pp. 562-563, Treaty of Greeneville; American State Papers, Ind. Affairs, I: 548, 571, 574.]

(4) Award Given to Remedy Insufficiency of Treaty Consideration Should Be Divided Similar to Treaty Provisions

The allowances made under Article 4 of the Treaty of August 3, 1795 which provided, inter alia, for the payment of permanent annuities of $1,000 to each of seven tribes, and $500 to each of five tribes, when read and construed with the instructions of General Anthony Wayne of April 8, 1795 and other treaty instructions and proceedings preceding the treaty, together with the often expressed concept of the Indian tribes that the lands North of the Ohio were owned as the "common property" of the several tribes, create a presumption of liability, as a matter of law, to the claimant tribes and bands, in that proportion of the value of the total area ceded, which each claimant band's share of the annuity bore to the total annuities.

Therefore, any supplemental treaty consideration found to be due as a result of the claims filed by the petitioners herein should, as a matter of law and equity, be similarly divided. [*Red Lake, Pembina and White Earth Bands, et al. v. United States*, 164 Ct. Cl. 389 (1964).]

(5) Determination of Title to Other Pieces of Land or "Enclaves" as Regards Lands Other Than Royce Area 11

This petitioner offered the Indian Claims Commission as an alternative to the adoption of a finding similar to the theory set forth in paragraph (1) above, that the Commission find a compensable interest vested in this petitioner in certain enclaves

or "pieces of land" as they are referred to under Article III of the Treaty of Greeneville of August 3, 1795. We refer specifically to items (12.) and (13.) under Article III [Treaty of Greeneville, 7 Stat. 49, August 3, 1795] which are as follows:

> "(12.) The post of Detroit and all the land to the north, the west and the south of it, of which the Indian title has been extinguished by gifts or grants to the French or English governments; and so much more land to be annexed to the district of Detroit as shall be comprehended between the river Rosine on the south, Lake St. Clair on the north, and a line, the general course whereof shall be six miles distant from the west end of Lake Erie, and the Detroit river. (13.) The post of Michillimackinac, and all the land on the island, on which that post stands, and the main land adjacent, of which the Indian title has been extinguished by gifts or grants to the French or English governments; and a piece of land on the main to the north of the island, to measure six miles on Lake Huron, or the streight between Lakes Huron and Michigan, and to extend three miles back from the water of the lake or streight, and also the island DeBois Blanc, being an extra and voluntary gift of the Chipewa nation."

The evidence fully supported this petitioner's position as set forth in paragraph (1) above; however, failing the Court's adoption of that proposition, the Commission should have found a compensable interest in the foregoing enclaves or "pieces of land" based

upon joint occupancy and possession with Wyandot, Ottawa and Chippewa petitioners.

Reasons for Granting the Writ

(1) The Decisions Below Conflict with the Constitutional Guarantee of the Rights of Petitioner That It Shall Not Be Deprived of Its Property Without Due Process of Law Under the 5th Amendment, and Adopts a Faulty Theory of Title as It Applies to the Instant Proceeding

The Court of Claims, in reaching its decision as regards the large Royce Area 11, affirms the judment of the Indian Claims Commission by refusing to find that the Indian petitioners met the proof necessary to establish "aboriginal" or "recognized" title. In doing so the Court admitted its reluctance "to discard a principle which has, in numerous cases, been held to meet the purposes and objectives of the Indian Claims Commission Act."

This conclusion was reached by the Court of Claims despite the language in the opinion that "In the past, the Court has held on several occasions that two or more tribes or groups might inhabit an area in 'joint and amicable' possession without erasing the 'exclusive' nature of their use and occupancy." [*Sac & Fox Tribe v. United States*, 179 Ct. Cl. 8, 383 F. 2d 991, cert. denied, 389 U.S. 900 (1967); *Turtle Mt. Band of Chippewa Indians v. United States*, 203 Ct. Cl. 426, 490 F. 2d 935 (1974); *United States v. Pueblo of San Ildefonso*, ... Ct. Cl. ... (April 1975).]

The Court then proceeds by limiting that theory to such close alliances as existed between the Sac and

Fox, instead of expanding it to the twelve tribes who were parties to this treaty of cession. It should be emphasized that this was not a treaty of friendship designed to win peace with the tribes, but a treaty of cession. Should not the term alone imply that the land to be relinquished belonged to the tribes who ceded it?

Contrary to language in the Court of Claims opinion, however, the overwhelming evidence in this case showed that there was a community of interest in the lands in Royce Area 11, and that those lands were not owned and occupied exclusively as separate lands by individual tribes.

The treaty of Greeneville, being an early treaty involving many tribes, cannot be judged with the same theories of title, i.e. "aboriginal," "recognized" as those treaties which followed many years later, when tribes had been actually removed by the United States to the confines of strict perimeters.

By refusing the theory of a commonly owned area, the lower Courts have imposed upon the Indians a capitalistic theory of ownership of land not even understood, far less adopted by the Indians; but then having imposed that theory, the Court holds that the Indian tribe may not own land with any other Indian tribe or tribes, thereby denying to the Indian the rights of joint ownership afforded to others in our capitalistic society.

No attorney or judge familiar with the evolution of the law as it applies to Indian title to land can

deny that the trend in the courts has been toward broader interpretation, more liberal to the Indians, as time passes and new law is written.

(2) Substantial Evidence Concerning the Statements of the Parties to the Treaty Themselves Were Disregarded in Favor of Inappropriate Theories of Title Developed by the Courts Years Later

That this Potawatomi petitioner had a substantial interest in the lands ceded under the treaty is evidenced by the fact that beginning in June, 1795, when Indians started arriving for the treaty, an official return taken on August 7, 1795, lists the following: 180 Wyandots, 381 Delawares, 143 Shawnees, 45 Ottawas, 46 Chippewas, 240 Potawatomis, 73 Miamis and Eel Rivers, 12 Weas and Piankashaws, and 10 Kickapoos and Kaskaskias as having been "present at and parties to the treaty of Greeneville" which, after long weeks of counseling, was signed on August 3, 1795 [Lowrie and Clarke, eds., American State Papers, Indian Affairs, Vol. 1, pp. 562-582; Dft. Ex. 31, 7 Stat. 49.]

It was the strategy of the Secretary of War to divide and conquer the confederacy of twelve tribes which gathered at Greeneville, as is made clear by one of the instructions to the Commissioners from Secretary of War Knox on April 26, 1793 prior to the treaty of 1795. "It will be an object worthy of your attention to endeavor, as far as shall be consistent with the main design of peace to form separate contracts, or treaties, relatively to boundaries, with the several tribes to whom the lands actually belong,

avoiding, as much as possible, to confirm the idea of an union or general confederacy of all the tribes, or of any patronage of the whole over the lands of any particular tribes, or subdivisions of tribes. But, as the Indians are much attached to the idea of a general confederacy, your proceedings, in these particulars, will require peculiar caution and management." [Pet. Ex. #95, Dkt 27-B, 89, 252, 335, 338 American State Papers, Vol. I, I A pp. 340-342.]

So it is the effect of the holdings of the lower courts to deny the joint ownership of Area 11 by the petitioner tribes.

This petitioner has consistently argued that the tribes owned Royce Area 11 jointly as contended by the spokesman for the tribes themselves immediately preceding the treaty, in the treaty deliberations.

Tarke (The Crane) spoke for the Wyandots, as was customary and also represented the Delawares. In doing so he approved the terms of the Fort Harmar treaty, which preceded this one but was never fully invoked, and stated that the lands belonged equally to all the Indian tribes. A fact that their current attorneys have been slow to adopt.

The spokesman for the Three Fires (Chippewas, Ottawas and Potawatomis) agreed to be bound by the same treaty but claimed their nations had land rights in the Ohio cession, for which they received no payment after 1789, as did some of the other signatory tribes.

Masses, speaking "in behalf of the three fires,

Ottawas, Chippewas, and Pattawatimies," observed that "the Wyandots were foremost at that treaty; we, the three fires, followed them." Afterward, some "foolish young men" had reclaimed the hatchet and used it against the United States. "Now," Massas declared, "[we] throw the hatchet into the middle of the great lake, where it could never again be found and taken up." Then, reverting to what had gone on at the Treaty of Fort Harmar, Massas observed that the representatives of the Three Fires had not had good interpreters at that Treaty; and, as a consequence, when they left the Treaty they were unacquainted with many of its particulars. "I was surprised," Massas told Wayne, "when I heard your voice, through a good interpreter, say that we had received presents and compensation for those lands which were . . . ceded. We, the Three Fires, were never informed of it; if . . . the Wyandots, and . . . the Delawares, have received such presents, they have kept them to themselves. I always thought that we, the Ottawas, the Chippewas, and Pattawatamies, were the true owners of those lands, but now I find that new masters have undertaken to dispose of them, so that, at this day, we do not know to whom they, of right, belong . . . " [Treaty of Ft. Harmar, Jan. 9, 1789, 7 Stat. 28.]

The Mohawk Chief Joseph Brant also espoused the concept of joint tribal ownership of these lands; and it was no secret that Secretary of War Timothy Pickering wished to destroy this concept and, therefore, suggested that the United States should fix boundary lines between the tribes.

Another fact that favors the joint occupation concept as the proper manner of resolving the interests of the several tribes under this treaty (a matter that has received far too little attention in the trial of this matter in the lower courts), is that in the view of the United States as voiced by Anthony Wayne and others in 1795, they found the "reservations round the posts, etc. . . . of much greater consequence to the interest of the United States than the proposed relinquishment of territory." [See letter from Anthony Wayne to Timothy Pickering, Secretary of War, May 15, 1795, P. 418, Def. Ex. 434.]

Let us assume hypothetically that this Court fails to grant this Writ. By so doing, and by failing to adopt the concept of joint ownership and division of the award in accordance with the proportionate share received by the tribes in the treaty proceeds, it would impose on the Indian Claims Commission the almost impossible task of valuing the military posts and nearby reservations as compared to the larger Area 11, which was used jointly by all of the tribes.

It is hardly conceivable that the Indian Claims Commission would find that the total value of these posts and reserves near them would exceed the total market value of all the land included in Royce Area 11; but if the Commission does not, they would again disregard the opinion of the agents for the United States at the time of the treaty itself.

Despite these efforts to divide the Indians in the proceedings leading up to the treaty and at the treaty itself, the Indians remained united and no boundaries

were established, it being impossible to get them to agree that they did not hold the lands in common; yet we have 180 years later some of the attorneys representing those tribes and the lower courts, attempting to do what the tribal chieftains and the Treaty Commissioners refused to do in 1795; that is, divide up the lands by establishing boundaries between the tribes.

By such presumption we demean the parties to the treaties: the Treaty Commissioners and the chiefs who were responsible for representing the tribes, who are our clients.

How much more logical and intellectually honest it is to accept the judgment of those who were on the ground in 1795 and who knew what land they used or occupied, and who agreed to the division made of the treaty proceeds under Article 4 of the treaty.

In a recent nationally televised panel discussion as a follow-up segment of "Broken Treaty at Battle Mountain" broadcast over the Public Broadcasting Service network, Commissioner John Vance, a current member of the Indian Claims Commission, in a dialogue between him and Hugh Downs, the moderator of that show, made the following statements in answer to the question posed by Mr. Downs:

> *Mr. Downs:* "When you mention aboriginal title in some way as being interpretable different from some other kind of title, isn't it pretty well established right up through the Supreme Court that wherever a treaty with the Indians exists, that the treaty is to be construed in the way that

the Indians would naturally understand it, and I can't conceive that the Indians would understand that aboriginal title was somehow different from anybody else's title."

Commissioner Vance: "Mr. Downs, if we were to be entirely candid, and we must here, there are probably not a half a dozen people in the universe that understand aboriginal title . . . "

"I think that the lawyers who are familiar with this field of law would agree that concept of aboriginal title has been of benefit to the tribes as far as recovering judgments. Whether it is a faulty concept in a particular case is a question that is open to interpretation . . " [Vance, John T., Commissioner, Indian Claims Commission, quotation from PBS Television Broadcast. Follow-up segment of "Broken Treaty at Battle Mountain" produced by Robert J. Civiello, WLIW-TV, Ellington Ave., West, Garden City, N.Y. 11530 (Summer, 1975)]

We submit that the concept of aboriginal title is a faulty concept in this particular case and that it should not have been adopted by the Indian Claims Commission to determine whether or not the twelve tribes involved in the treaty cession did or did not have a compensable interest in the ceded lands, but that rather the concept of joint and amicable possession should have been adopted.

Conclusion

For these reasons, a Writ of Certiorari to the United States Court of Claims should be granted.

Respectfully submitted,

ROBERT S. JOHNSON
1108 First National Bank Tower
Topeka, Kansas 66603
Attorney of Record for the
Pottawatomie Tribe of Indians,
The Prairie Band of the
Pottawatomie Tribe of Indians,
et al., petitioner

BERYL R. JOHNSON
Of Counsel

Certificate of Service

I hereby certify that on the 17 th day of September, 1975, all parties required to be served have been served by depositing the required copies of this "Petition for Writ of Certiorari to the United States Court of Claims" in a United States post office or mail box, with airmail postage prepaid, namely to the following:

Hon. Robert H. Bork
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Robert E. Fraley, Esq.
Lands & Natural Resources Division
Department of Justice
Washington, D.C. 20530

Robert Bell, Jr.
528 S. Main
New Canaan, Connecticut 06840

Rodney J. Edwards
800 First American National Bank Building
Duluth, Minnesota 55802

James R. Fitzharris
700 Lake Shore Drive
Escanaba, Michigan 49829

Allan Hull
6505 Wilson Mills Road
Mayfield Village, Ohio 44143

Jack Joseph
69 West Washington
Chicago, Illinois 60602

David L. Kiley
201 First National Bank Bldg.
Marion, Indiana 46952

Paul G. Reilly
Suite 1000, The Watergate 600
600 New Hampshire Ave., N.W.
Washington, D.C. 20037

Louis L. Rochmes
9800 Ashburton Lane
Bethesda, Maryland 20034

Edwin A. Rothchild
8000 Sears Tower
Chicago, Illinois 60606